Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1701

DR. DON M. SMART, *Petitioner,*

v.

TEXAS POWER AND LIGHT COMPANY, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

1. Statutes iii

2. Authorities Cited iv

3. Opinion Below 1

4. Jurisdiction 2

5. Questions Presented 2

6. Statement of the Case 3

7. Reasons for Granting the Writ 5

   1. THE DECISION BELOW IS BASED UPON *STATE V. JACKSON*, 388 S.W.2d 924 (TEX. SUP. CT. 1965), WHICH IS UNCONSTITUTIONAL IN DENYING DUE PROCESS, EQUAL PROTECTION, AND JUST COMPENSATION AS PROVIDED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE JACKSON WAS PREVENTED FROM CONTESTING THE TAKING OF HIS PROPERTY WHEN HE WITHDREW DEPOSITED FUNDS WHICH HE WAS NOT ALLOWED TO RETAIN AND HIS LAND WAS EXPROPRIATED AND HE WAS ALLOWED ONLY NOMINAL DAMAGES OF $1.00. ..... 5, 6

   2. THE TEXAS SCHEME OF CONDEMNATION IS UNCONSTITUTIONAL AS THERE

IS NO PROVISION FOR A CONDEMNEE TO RECEIVE INTEREST FROM THE DAY OF THE TAKING OF HIS PROPERTY WHEN THE CONDEMNOR DEPOSITS THE AWARD. 6, 7

3. THE DECISION BELOW USED A VOID STATE CONDEMNATION PROCEEDING TO SUPPORT THE *JACKSON* TYPE PRESUMPTION OF CONSENT TO THE TAKING. 8

4. THE TEXAS "QUICK TAKE" SCHEME OF CONDEMNATION, TEX. REV. CIV. STATS. ANN., ARTS. 3264-3271 IS UNCONSTITUTIONAL FOR FAILURE TO PROVIDE A HEARING BEFORE A FAIR AND IMPARTIAL BODY AT A MEANINGFUL TIME PRIOR TO SEIZURE OF THE PROPERTY. 9

8. Conclusion 11

9. Certificate of Service 12

STATUTES

	Page
United States Constitution, Fifth Amendment	2, 5, 6
Unied States Constitution, Fourteenth Amendment	2, 5
Title 28 U.S.C. 1254(1)	2
Title 28 U.S.C. 1331	2
Title 28 U.S.C. 1343	2
Title 28 U.S.C. 2201	2
Title 42 U.S.C. 1983	2
Articles 3264-3271, Texas Revised Civil Statutes Annotated	2, 3, 7, 9
Article 1436, Texas Revised Civil Statutes Annotated	3

AUTHORITIES CITED

CASES

	Page
Armstrong v. Manzo, 380 U.S. 545	10
Brunson v. State, 444 S.W.2d 598 (Tex. Sup. Ct. 1969)	7
Burch v. City of San Antonio, 518 S.W.2d 540, 545 (Tex. Sup. Ct. 1975)	9
City of Houston v. Kunze, 262 S.W.2d 947 (Tex. Sup. Ct.)	8
Fuentes v. Shevin, 407 U.S. 67	10
Gandy v. State, 319 S.W.2d 375	9
Gibson v. Berryhill, 411 U.S. 564, 36 L.Ed.2d 488, 500	10
Goldberg v. Kelly, 397 U.S. 254	10
Houston North Shore Ry. Co. v. Tyrrell, 98 S.W.2d 786, 793 (Tex. Sup. Ct. 1936)	9
Karl v. State, 345 S.W.2d 358	8
Littlejohn v. Lone Star Gas Company, 347 S.W.2d 956	
Parker v. Fort Worth and Denver City Ry. Co., 19 S.W. 518 (Tex. Sup Ct.)	8
Smart v. Texas Power and Light Company, 525 F.2d 1211 (1976)	8
Sniadach v. Family Finance Corporation, 395 U.S. 337	10
State v. Jackson, 388 S.W.2d 924 (Tex. Sup. Ct. 1965)	2, 4, 5, 6, 10
U. S. v. Miller, Cal, 63 S.Ct. 276, 279; 317 U.S. 369; 87 L.Ed. 336; 147 A.L.R. 55	8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Dr. Don M. Smart, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 14, 1976.

OPINION BELOW

The District Court granted the Respondents' motion to dismiss on May 7, 1975. This was affirmed by the Fifth Circuit on January 14, 1976 and Petitioner's motion for rehearing en banc was denied on February 25, 1976.

JURISDICTION

Jurisdiction is founded upon the Fifth and Fourteenth Amendments to the United States Constitution; Title 28 U.S.C. Sections 1331, 1343, 2201; and Title 42 U.S.C. Section 1983.

The judgment in the Court of Appeals for the Fifth Circuit was entered on January 14, 1976. A timely petition for rehearing en banc was denied on February 25, 1976 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is the irrebutable presumption of legal consent to the taking of a condemnee's property on withdrawing deposited funds, *State v. Jackson*, 388 S.W.2d 924 (Tex. Sup. Ct. 1965), unconstitutional because of lack of due process, equal protection, and just compensation as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Is the Texas "quick take" scheme of condemnation, Tex. Rev. Civ. St. Ann., Arts. 3264-3271, which fails to provide interest from the day of the "quick take," unconstitutional because of failure to provide due process, equal protection, and just compensation as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. Can a void state court condemnation proceeding support the *Jackson* type presumption of consent to the taking?

4. Is the Texas "quick take" scheme of condemnation, Tex. Rev. Civ. Stat. Ann., Arts. 3264-3271 unconstitutional for failure to provide a hearing before a fair and impartial body at a meaningful time prior to seizure of the property?

STATEMENT OF THE CASE

Petitioner, Dr. Don M. Smart, is the owner of certain property interests in Collin County, Texas subject to condemnation proceedings by the Respondent Texas Power and Light Company.

Texas Power and Light Company through their attorney, J. E. Abernathy, filed a petition in condemnation for a power line easement against Dr. Don M. Smart and four other Defendants, but not Dr. Scott Smart, in Collin County, Texas in September 1970. Special commissioners, who were appointed by the County Judge, made an award, without apportionment, of $34,000.00 to the Defendants. Texas Power and Light Company, pursuant to Texas law, deposited $68,000.00 into the registry of the Court and went into possession of the property. Several months later the Defendants drew down the amount of the award and divided it among themselves. Some of the Defendants retained J. E. Abernathy as their counsel. He continued to represent some of the Defendants while representing Texas Power and Light Company at the same time. The matter was transferred to the 199th District Court of Texas when Dr. Don M. Smart appealed from the commissioners' award. There has never been any hearing in Texas District Court on this matter, and there has never been an adjudication awarding the power line easement to the company.

The Texas scheme of condemnation is controlled by the Tex. Rev. Civ. Stats. Ann., Arts. 1436, and 3264-71. It specifically spells out the procedure a company must follow in condemning property. In this case, Texas Power and Light Company's president, T. L. Austin, made the decision to condemn Petitioner's property. This was without a corporate resolution. In Texas, the commissioners' hearing is an administrative proceeding and condemnation does not become a case at law until an appeal is made to the award

by any party and is transferred to a Texas state court. At this commissioners' hearing a landowner may not question the right, convenience, or necessity for the seizure of his property as the only question to be considered is damages. The Texas statutory scheme does not provide any means of compensating the landowner from the time he is dispossessed until there is a judicial determination of damages, which may be several years, and in this case there is a time lapse of six years without any adjudication yet, Dr. Smart still retains title to his property.

Texas law has been settled by *State v. Jackson*, 388 S.W. 2d 924 (Tex. Sup. Ct.) that a landowner waives his right to contest the validity of the taking of his property if he draws down the commissioners' award. This waiver is forced upon the landowner even though the award money is taken away from him. The condemnor is able to make a profit on the property seized and forfeits no legal rights by making such a seizure even though he does not have legal title.

The Texas scheme penalizes the landowner who draws down the award by holding he may not contest the validity of the taking although he receives no consideration for this forfeiture of his legal rights and there is no provision under Texas law to place him in the same monetary position he had before his property was seized.

The order of dismissal by the District Court was bottomed on *State v. Jackson*. In *Jackson*, the Texas Supreme Court held the landowner forfeited his right to contest the validity of the taking of his property because he drew down the award and at the same time, that Court took away his award. The forfeiture was predicated on the legal fiction that the landowner could draw down and keep the award. This was not true as the Court took away his award. Fur-

thermore, Jackson's property was expropriated and he was given only nominal damages of $1.00.

Dr. Don M. Smart would not have had any property in hand or have received any payment of interest for the last six years had he not drawn down the award. The Texas statutury scheme has no provisions to reimburse the landowner from the time of the seizure of his property without extracting the penalty of forfeiture of his constitutional right to contest the taking. This is in contrast to the giant power companies who have demanded and received their just compensation as a fair return on their property from the time it is taken without waiving any constitutional rights.

In another suit in which Texas Power and Light Company condemned property of Dr. Don M. Smart in Dallas County, Texas, the company abandoned their condemnation proceedings although they had made the same claim as to the necessity of the taking.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS BASED UPON *STATE V. JACKSON*, 388 S.W.2d 924 (TEX. SUP. CT. 1965), WHICH IS UNCONSTITUTIONAL IN DENYING DUE PROCESS, EQUAL PROTECTION, AND JUST COMPENSATION AS PROVIDED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE JACKSON WAS PREVENTED FROM CONTESTING THE TAKING OF HIS PROPERTY WHEN HE WITHDREW DEPOSITED FUNDS WHICH HE WAS NOT ALLOWED TO RETAIN AND HIS LAND WAS EXPROPRIATED AND HE WAS ALLOWED ONLY NOMINAL DAMAGES OF $1.00.

In *State v. Jackson*, 388 S.W.2d 924 (Tex. Sup. Ct. 1965), the landowner Jackson withdrew $1,100.00 which was the commissioners' award. The Texas Supreme Court denied his right to assert the condemning authority had no legal right to take his property on the legal fiction that he would not be permitted to retain his compensation and at the same time assert his right to contest the taking. The legal fiction was that Jackson got to retain the $1,100.00. It is necessary to read both the Texas Court of Civil Appeals and the Texas Supreme Court decisions to learn that the Supreme Court took away Jackson's land, took away his $1,100.00, and awarded him only nominal damages of $1.00. This cannot support due process, equal protection and just compensation as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States as a matter of law and makes *Jackson* unconstitutional.

In the alternative, if the award constitutes the consideration for his legal right to contest the taking, then there was no compensation for the property. If the award is the money equivalent of the property, then there was no just compensation for the forfeiture of his legal right to contest the taking and the case is still unconstitutional.

Under Texas law it would be a denial of equal protection of law for the landowner to forfeit any right upon withdrawing the deposited funds which is the money equivalent of the property as the condemnor does not forfeit any rights by seizing the property.

2. THE TEXAS SCHEME OF CONDEMNATION IS UNCONSTITUTIONAL AS THERE IS NO PROVISION FOR A CONDEMNEE TO RECEIVE INTEREST FROM THE DAY OF THE TAKING OF HIS PROPERTY WHEN THE CONDEMNOR DEPOSITS THE AWARD.

There is no provision under the Texas condemnation statutes for a condemnee to receive interest from the day of the taking of his property when the condemnor deposits the award, Tex. Rev. Civ. St. Ann., Arts. 3264-71. The Fifth Circuit set forth the case of *Brunson v. State*, 444 S.W.2d 598 (Tex. Sup. Ct. 1969) for the proposition that interest computed from the day of the taking is a proper element of the final award under Article 3265, Tex. Rev. Civ. St. Ann. *Brunson* is not in point because in that case no award was deposited by the condemnor. The present case is concerned with interest from the day of the taking when an award has been deposited. Since the Fifth Circuit sought to seek authority to give interest from the day of the taking, it must be inferred that the Texas condemnation statutes are unconstitutional as they now stand as there is not any authority that a condemnee can receive money from the day of the taking if the condemnor deposits an award.

Assuming arguendo that *Brunson v. State* did allow a condemnee to receive interest from the day of the quick taking when an award is made, it still would not meet the constitutional mandate that the condemnee must be placed in the same position monetarily as before the condemnation. In the present case there was an award of $34,000.00 and the case has now been pending for six years. Assuming a rate of interest at 6%, there would be an accrual of interest of $2,040.00 every year, which would make a total accrual of interest of $12,240.00 plus the original $34,000.00, which would give the landowner $46,240.00 at the end of six years. This would be following the *Brunson* formula in computing interest from the day of the quick taking. This is not equivalent to having the property in hand and being allowed to reinvest the interest annually. With a reinvestment of 6% interest annually, the landowner at the end of six years would have $48,229.63. The landowner would still not be receiving just compensation as set forth by the Supreme

Court that he must be in the same monetary position after the taking as before, *U. S. v. Miller*, Cal, 63 S.Ct. 276, 279; 317 U. S. 369; 147 A.L.R. 55; and 87 L.Ed. 336.

The Fifth Circuit in seeking a way to save the constitutionality of the Texas condemnation procedure would find their formula for figuring inteerst would make the landowner in the present case short by $1,989.63 as compared with drawing down the award.

3. THE DECISION BELOW USED A VOID STATE CONDEMNATION PROCEEDING TO SUPPORT THE *JACKSON* TYPE PRESUMPTION OF CONSENT TO THE TAKING.

The Fifth Circuit adjudicated on January 14, 1976 that Dr. Scott Smart was the owner of an undivided one-quarter interest of the property in question, *Dr. Scott Smart v. Texas Power and Light Company*, 525 F.2d 1211 (1976). This ownership is res judicata as to the parties in the present suit. Dr. Scott Smart was not made a party to the condemnation proceeding involving Dr. Don Smart and such an error upon the part of Texas Power and Light Company is fatally defective as notice and service upon the landowners is positively jurisdictional, *City of Houston v. Kunze*, 262 S.W.2d 947 (Tex. Sup. Ct.); *Parker v. Fort Worth and Denver City Ry. Co.*, 19 S.W. 518 (Tex. Sup. Ct.); *Littlejohn v. Lone Star Gas Company*, 347 S.W.2d 956; and *Karl v. State*, 345 S.W.2d 358. The term owner includes any person who has an interest in the property and only when every interest of every character is acquired can the property be devoted fully and without restraint or interference to the public purpose and only when every person is compensated as an owner is the constitutional mandate fulfilled, *Houston North Shore Ry. Co. v. Tyrrell*, 98 S.W.2d 786, 793 (Tex. Sup. Ct. 1936). Texas Power and

Light Company's remedy under the Texas law is to take a non-suit in state court and initiate a new proceeding for condemnation including Dr. Scott Smart as a party Defendant, *Gandy v. State*, 319 S.W.2d 375.

The state court proceeding is also void in that the Texas Power and Light Company did not pass a resolution condemning Dr. Don M. Smart's land and it was not possible as a matter of law to delegate the right of eminent domain to its president, T. L. Austin, who was the only individual making the decision to condemn Dr. Smart's land, *Burch v. City of San Antonio*, 518 S.W.2d 540, 545 (Tex. Sup. Ct. 1975).

It is ironic that Petitioner should be procedured out of court when the fundamental procedural defects committed by Texas Power and Light Company are ignored. This is an example of condemnation procedure at the present time in Texas and there is not any pretext of following due process, equal protection, and just compensation as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. THE TEXAS "QUICK TAKE" SCHEME OF CONDEMNATION, TEX. REV. CIV. STATS. ANN., ARTS. 3264-3271 IS UNCONSTITUTIONAL FOR FAILURE TO PROVIDE A HEARING BEFORE A FAIR AND IMPARTIAL BODY AT A MEANINGFUL TIME PRIOR TO SEIZURE OF THE PROPERTY.

Under Texas condemnation proceedings a landowner is served with a notice of a commissioners' hearing, which is a nonjudicial administrative proceeding, which only considers damages. After the award, the condemnor may post the amount of the award and go into possession. There is no opportunity whatsoever for the landowner to contest the validity of the taking of his property.

When a benefit is to be administratively terminated, the beneficiary must be given notice which details the reasons for the proposed determination and afforded a suitable opportunity to prepare for a hearing, *Goldberg v. Kelly*, 397 U.S 254. A hearing in which property rights are to be affected must be granted at a meaningful time and manner. *Armstrong v. Manzo*, 380 U. S. 545. The purpose of such a hearing is to protect the landowner in the use and possession of his property from arbitrary enchroachment and to minimize substantially unfair or mistaken deprivations of property, the danger of which is especially great when the state seizes goods simply on the application of or for the benefit of a private party, *Fuentes v. Shevin*, 407 U. S. 67. This hearing must ordinarily be held in advance of the deprivation, *Sniadach v. Family Finance Corporation*, 395 U. S. 337. Texas Power and Light Company conducted the only hearing and determination for the condemnation of Dr. Don Smart's property before this seizure. There is no provision under Texas condemnation procedure for Dr. Smart to contest the taking prior to the seizure. Texas Power and Light Company has a substantial pecuniary interest in the seizure of Dr. Smart's property. Due process requires the person or body conducting the hearing or making the determination shall be free of any interest in the controversy, *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed.2d 488, 500.

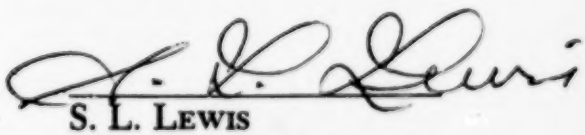
Present Texas condemnation procedure is clearly in conflict with the cited case law as to due process, equal protection, and just compensation.

CONCLUSION

State v. Jackson is a legal fiction in which a landowner was expropriated of his right to contest the taking of his property because of his withdrawal of an award which he was not allowed to keep. The Texas "quick take" scheme of condemnation does not place a landowner in the same monetary position after the condemnation as before. The lower court presumed the state court condemnation proceeding was valid when actually it was void. The Texas scheme of condemnation is unconstitutional in not providing an opportunity for a hearing before a fair and impartial body at a meaningful time prior to seizure of property.

This case presents procedural fantasies for denying a landowner due process, equal protection and just compensation. It is of national significance and therefore writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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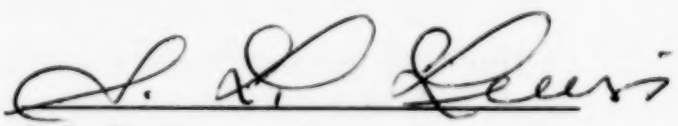
CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing petition for writ of certiorari on counsels for Respondents (three copies each), by depositing same in the United States mail, postage prepaid, on May 21, 1976, addressed to Frank Ryburn, Attorney for Texas Power and Light Company, 1522 Fidelity Union Life Building, Dallas, Texas 75201, and David R. Thomas, Assistant Attorney General of Texas, 2930 Turtle Creek Plaza, Suite 114, Dallas, Texas 75219, counsels of record for Respondents.



S. L. LEWIS

TYPOGRAPHICS LEGAL INC DALLAS TEXAS

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NO. 75-1701

DR. DON M. SMART, *Petitioner,*

v.

TEXAS POWER AND LIGHT COMPANY, ET AL., *Respondents.*

ADDENDUM OF EXHIBITS OF JUDGMENT OF THE DISTRICT COURT, COURT OF APPEALS, FIFTH CIRCUIT AND ORDER DISPOSING OF PETITION FOR REHEARING

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IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

DR. DON M. SMART VS. TEXAS POWER AND LIGHT COMPANY, ET AL	CIVIL ACTION NO. 3-6231-F

ORDER

This is a case in which the Plaintiff-landowner challenges the Texas statute[1] which permits privately owned utility companies such as the Defendant to exercise the right of eminent domain. The case is before the Court on the Defendant's Motion to Dismiss and the Plaintiff's Motion for Summary Judgment. I have concluded that the case must be dismissed and the Plaintiff's Motion denied.

The pleadings before the Court reflect that in 1970 the Defendant utility company began condemnation proceedings in state court involving certain tracts of land in Collin County, Texas. Three court-appointed commissioners determined that the value of the land was $34,000. The Defendant took possession of the land and built a power transmission line across it. The Plaintiff's appeal is still pending in the state court.

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[1] TEX. REV. CIV. STAT. ANN. art. 1436: "Such corporation shall have the right and power to . . . condemn and appropriate the lands . . . and property of any person . . ."

Among several other grounds, the Defendant insists that this case must be dismissed because the landowner, Dr. Smart, withdrew all or part of the funds that were paid into the registry of the state court.

The Supreme Court of Texas wrote in State vs. Jackson, 338 S.W.2d 924, 925 (1965):

> After an award has been made, and the money deposited in the registry of the Court and the landowner has withdrawn the same, he cannot thereafter contend that the taking was unlawful. In legal contemplation, he has consented to such taking and will not be permitted to retain his compensation and at the same time assert that the condemning authority had no right to take his property under the eminent domain power.

The Texas decision in *Jackson* is consistent with the decision of the Supreme Court of the United States in Winslow vs. Baltimore & O.R. Co., 208 U.S. 59 (1908), in which the condemnor was a railroad. The Court held that by accepting the sum awarded in the condemnation proceedings, the landowners lost their right to assert that the condemnation petition was not maintainable.

I believe that the cited decisions require the dismissal of this case.

Accordingly, it is ORDERED that the Plaintiff's Motion for Summary Judgment be in all things denied and that the Defendant's Motion to Dismiss be granted.

ROBERT W. PORTER
United States District Judge

May 7th, 1975

Dr. Don M. SMART,
Plaintiff-Appellant,

v.

TEXAS POWER AND LIGHT COMPANY et. al.,
Defendants-Appellees.

No. 75-2874
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1976.

Power company took an easement over property for electrical transmission lines under the Texas "quick taking" condemnation statutes, and property owner then filed suit challenging the constitutionality of that condemnation law provision which forecloses a landowner who withdraws the money deposited in the registry of the court from thereafter contending that the taking is unlawful. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., dismissed the suit, and plaintiff appealed. The Court of Appeals held that the irrebuttable presumption of legal consent to the taking of the condemnee's property on withdrawal of the deposited funds is not unconstitutional.

Affirmed.

See also, 5 Cir., — F.2d. —.

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*Rule 18, 5 Cir., see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

1. Eminent Domain 167(2)

Irrebuttable presumption of legal consent to the taking of a condemnee's property on withdrawal of the deposited funds is not unconstitutional. Vernon's Ann.Tex.Civ.St. arts. 3264-3271.

2. Eminent Domain 247(2)

Under Texas law, interest computed from the day of the "quick taking" is a proper element of the final condemnation award. Vernon's Ann. Tex.Civ.St. art. 3265.

3. Constitutional Law 281

The necessities and expediency surrounding the taking of property is a legislative rather than a judicial question and, therefore, "quick taking" without a prior hearing is consistent with due process. Vernon's Ann.Tex.Civ.St. arts. 3264-3271.

4. Constitutional Law 281

Even when a condemnee accepts the award and is thus foreclosed from challenging the validity of "quick taking" condemnation, he may pursue his due process right to receive just compensation. Vernon's Ann.Tex.Civ.St. arts. 3264-3271.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

Plaintiff-appellant challenges the constitutionality of that provision of the Texas "quick taking" condemnation law

which forecloses a landowner who withdraws the money deposited in the registry of the court from thereafter contending that the taking was unlawful. Holding such law to be constitutional, we affirm the dismissal of plaintiff's other constitutional contentions and assertions of invalidity in the taking of his property.

The Texas Power and Light Company took an easement over plaintiff's property for electrical transmission lines under the Texas "quick taking" condemnation statutes, making the required deposit in court of the amount of the award set by the condemnation commissioners. Vernon's Tex.Rev.Civ.Stat.Ann. Arts. 3264-3271. With the state court condemnation suit still pending, the plaintiff brought this action in federal court challenging the constitutionality of the Texas proceedings. Specifically, plaintiff challenges the constitutionality of: first, the "quick taking" provisions of the Texas eminent domain statutes; second, the statutory delegation of eminent domain power to private corporations; and third, the Texas decision of *State v. Jackson*, 388 S.W.2d 924 (Tex.Sup.Ct.1965) which holds that withdrawal by a condemnee of the money paid into the court on quick taking forecloses a legal challenge to the validity of the taking and limits further litigation to the amount of the award.

Since plaintiff took down the funds deposited in the registry of the Texas court, the key to his right to challenge the validity of the taking lies in his attempt to overcome the effect of Texas law that

> In legal contemplation, he has consented to such taking and will not be permitted to retain his compensation

> and at the same time assert that the condemning authority had no right to take his property under the eminent domain power.

State v. Jackson, 338 S.W.2d at 925.

[1] *State v. Jackson's* irrebuttable presumption of legal consent to the taking of a condemnee's property on withdrawal of the deposited funds is not unconstitutional. The eminent domain provisions assure adequate notice to the landowner. By refusing to withdraw the award money, the condemnee may receive a hearing on the validity of the condemnation before a Texas district court, which has authority to grant injunctive relief. Vernon's Tex.Rev. Civ.Stat.Ann. Art. 3269. The United States Supreme Court has approved a similar federal eminent domain procedure (applied in a different context) specifically rejecting asserted Fifth Amendment deficiencies as to notice and hearing. *United States v. Miller*, 317 U.S. 369, 382, 63 S.Ct. 276, 87 L.Ed. 336 (1943). See also *Robinson v. Transcontinental Gas Pipe Line Corp.*, 421 F.2d 1397 (5th Cir.), *cert. denied*, 398 U.S. 905, 90 S.Ct. 1695, 26 L.Ed.2d 64 (1970). The Supreme Court long ago approved the *Jackson*-type presumption of consent:

> But, by accepting the sum awarded for the land actually taken, [the property owners] have lost the right to insist that the petition [of condemnation] was not maintainable. They cannot ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled . . . .

Winslow v. Baltimore & Ohio Railroad Co., 208 U.S. 59, 62, 28 S.Ct. 190, 191, 52 L.Ed. 388 (1908).

[2] Appellant asserts that the only way he could receive a return on his investment, *i. e.*, just compensation under the Fifth Amendment, pending litigation and in light of the immediate use of his land, is by taking down the initial award. The Texas Supreme Court recently announced, however, that interest computed from the day of the taking is a proper element of the final award under Art. 3265. *Brunson v. State*, 444 S.W.2d 598 (Tex.Sup. Ct. 1969).

[3] The Supreme Court has on numerous occasions held that the "necessity and expediency" surrounding the taking of property is a legislative rather than a judicial question, and therefore "quick taking" without a prior hearing is consistent with due process. *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); *Georgia v. Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 (1924); *Joslin Manufacturing Co. v. Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167 (1923); *Bragg v. Weaver*, 251 U.S. 57, 40 S.Ct. 62, 64, L.Ed. 135 (1919). See *2,953.15 Acres of Land v. United States*, 350 F.2d 356 (5th Cir. 1965).

[4] One practical effect of this procedure is to require the land owner to initiate any hearing on the validity of the taking, but this aspect of the Texas eminent domain laws has been held to be compatible with due process. *Joiner v. City of Dallas*, 380 F.Supp. 754, 772 (N.D.Tex.), *aff'd*, 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974). Even when a condemnee accepts the award and is foreclosed from challenging the validity of the condemnation,

he may pursue his due process right to receive just compensation. *State v. Jackson, supra.*

We affirm the district court's dismissal of the plaintiff's suit on the ground that he is foreclosed from challenging the validity of the taking. By this disposition, we need not address appellees' arguments on the issues of laches and abstention, nor appellant's nonconstitutional arguments on statutory interpretation and just compensation.

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
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CLERK
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TELEPHONE 504-589-6514

February 25, 1976

TO ALL COUNSEL OF RECORD

No. 75-2874—Dr. Don M. Smart v. Texas Power and Light Company, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

by Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. S. L. Lewis
Mr. Frank M. Ryburn, Jr.
Mr. David Thomas

Supreme Court, U. S.
FILED
JUN 18 1976
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1701

DR. DON M. SMART,

Petitioner,

v.

TEXAS POWER & LIGHT COMPANY, et. al.,

Respondents.

RESPONDENT TEXAS POWER & LIGHT COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page

Table of Authorities ii

Preface 1

Statement of the Case 5

Reasons for Denying the Writ 7

I. The Court of Appeals correctly held that Smart is precluded from contesting Respondent's right to condemn and the jurisdiction of the condemnation court since Smart withdrew and accepted the Award of the Special Commissioners 7

II. The dismissal of Smart's suit is additionally correct under the doctrine of laches since Smart waited almost two years since the institution of the condemnation proceedings before filing the present action, the transmission lines having long since been constructed across the subject easement 11

III. Smart's contention with respect to interest affords him no right of relief in this action 12

IV. The condemnation proceedings pending in state court were validily instituted 14

V. Even if Smart were permitted to challenge the Texas condemnation laws, still the Federal Courts should abstain under the principles of equity, comity, and federalism since the condemnation proceedings are presently pending in the state court which is an entirely competent tribunal firmly bound to the Constitution 15

VI. Even if Smart were permitted to challenge the Texas condemnation laws, it is clear that said laws meet the tests of due process 16

Conclusion 19

Certificate of Service 21

Table of Authorities

Cases **Page**

Arcola Sugar Mills Co. v. Houston Lighting & Power Co., 153 S.W.2d 628 (Tex.Civ.App. 1941, error ref'd. W.M.) 16

Baber v. Texas Utilities Company et al (D.C.Tex. 1955) 128 F. Supp. 753, aff'd, 5 Cir., 228 F.2d 665 (1956) 2, 15

Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) 17

Bowers v. City of Taylor, 16 S.W.2d 520 (Tex.Com.App. 1929) 18

Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135 (1919) 17

Brunson v. State, 444 S.W.2d 598 (Tex. 1969) 13

Buffalo Bayou, etc. Railroad Co. v. Ferris, 26 Tex. 588 (1863) 18

Cavanaugh v. Looney, 248 U.S. 453, 39 S.Ct. 142, 63 L.Ed. 354 (1919) 15

City of San Antonio v. Grandjean, 91 Tex. 430, 41 S.W. 477 (1897) 8

Dallas County v. Plowman, 99 Tex. 509, 91 S.W. 221 (1906) 18

Dickinson v. Brown-Crummer Inv. Co., 10 Cir., 137 F.2d 615 (1943) 12

Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930) 17

Don Smart v. Jones, et al, 5 Cir., 530 F.2d 64 (1976) 4

Don Smart v. Texas Power & Light Company, 5 Cir., 525 F.2d 1209 (1976) 3

Floyd v. Turner, 23 Tex. 592 (1859) 18

Fort Worth Concrete Co. v. State, 400 S.W.2d 314 (Tex. 1966) 13

Page

Fort Worth & R.G.R. Co. v. Jennings, 76 Tex. 373, 13 S.W. 270 (1890) 18

Georgia v. Chattanooga, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 (1924) 17

Gossett v. State, 417 S.W.2d 730 (Tex.Civ.App. 1967, error ref'd., n.r.e.) 10

Green Street Association v. Daley, 7 Cir., 371 F.2d 1 (1967) cert.den. 389 U.S. 849 17

Hill v. Victoria County Drainage District No. 3, 5 Cir., 441 F.2d 416 (1971) 15

Housing Authority of City of Dallas v. Shambry, 252 S.W.2d 963 (Tex.Civ.App. 1952, error ref'd., n.r.e. at Id., 152 Tex. 122, 255 S.W.2d 184) 9, 13

Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) 15, 16

Joiner v. City of Dallas (D.C.Tex.1974) 380 F.Supp. 754, aff'd., Id., 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974) reh.den. 419 U.S. 1132 17

Joslin Mfg. Co. v. Providence, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167 (1923) 17

Koslosky v. Texas Electric Service Co., 213 S.W.2d 853 (Tex.Civ.App.1948, error ref'd.) 18

Lacy v. United States, 5 Cir., 216 F.2d 223 (1954) 12

Lewis v. John R. Brown, Chief Judge, et al, 404 U.S. 819, 92 S.Ct. 74, 30 L.Ed.2d 119 (1971) 3

Lewis v. Texas Power & Light Company, 276 S.W.2d 950 (Tex.Civ.App.1955, error ref'd., n.r.e.) 2

Lewis v. Texas Power & Light Company, et al, 5 Cir., 462 F.2d 1318 (1972) 2, 15

Lone Star Gas Co. v. City of Fort Worth, 128 Tex. 392, 98 S.W.2d 799 (1936) 18

Page

Louisiana Power & Light Co. v. Thibodeaux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959) 17

Louisville and Nashville Railroad Company v. Western Union Telegraph Company, 250 U.S. 363, 39 S.Ct. 513, 63 L.Ed. 1032 (1919) 17

Maddox v. Gulf, Colorado & Santa Fe Railroad Co., 293 S.W.2d 499 (Tex.Civ.App. 1956, error ref'd., n.r.e.) 10

Martin v. Creasy, 360 U.S. 219, 79 S.Ct. 1034, 3 L.Ed.2d 1186 (1959) 15

McCammon & Lang Lumber Co. v. Trinity & B.V. Ry. Co., 104 Tex. 8, 133 S.W.2d 247 (1911) 18

McConnico v. Texas Power & Light Company, 335 S.W.2d 397 (Tex.Civ.App.1960, error ref'd., n.r.e.) 8

Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916) 16

Nancy Gayle Smart v. Jones, 5 Cir., 493 F.2d 663 (1974), reh. den. 495 F.2d 1372, cert. den. 419 U.S. 1090, reh.den. 420 U.S. 939 3

Nancy Gayle Smart v. Texas Power & Light Company, et al, No. CA3-74-870-F U.S.Dist.Ct.N.D. Tex., Dallas Div.) 5

North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925) 17

Northern Pacific Railroad Co. v. Smith, 171 U.S. 260, 18 S.Ct. 794, 43 L.Ed. 157 (1898) 11, 12

Robinson v. Transcontinental Gas Pipe Line Corporation (D.C. Ga. 1969) 306 F.Supp. 201, aff'd., Id., 5 Cir. 421 F.2d 1397 (1970) cert.den. 398 U.S. 905 10, 11

San Antonio v. Sullivan, 57 S.W. 45 (Tex.Civ.App. 1900, error ref'd.) 18

Page

Scott v. City of Robinson, 404 S.W.2d 330 (Tex.Civ. App.1966, error ref'd., n.r.e.) 18

Scott Smart v. Texas Power & Light Company, et al, 5 Cir., 525 F.2d 1211 (1976) 4, 14

Shoemaker v. United States, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893) 17

State v. Jackson, 388 S.W.2d 924 (Tex.1965) 8

Stone v. Wylie, 34 S.W.2d 842, (Tex.Com.App. 1931) 18

The Mississippi and Rum River Boom Company v. Patterson 98 U.S. 403, 25 L.Ed. 206 (1879) 16

Trinity River Auth. of Tex. v. Sealy & Smith Found., 435 S.W.2d 864 (Tex.1968) 13

2,953.15 Acres of Land v. United States, 5 Cir., 350 F.2d 356 (1965) 17

United States v. Certain Parcels of Land, Etc. (D.C. Ohio 1957) 149 F.Supp. 696 10

United States v. Certain Parcels of Land, Etc., 5 Cir., 149 F.2d 81 (1945) 8

United States v. Dow, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958) 9

United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943) 9, 13

United States v. Smith, 5 Cir., 355 F.2d 807 (1966) 8

United States v. 25.02 Acres of Land, Douglas County, Colo., 10 Cir., 495 F.2d 1398 (1974) 8

United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 63 S.Ct. 1074, 87 L.Ed. 1390 (1943) 8

West Texas Utilities v. Lee, 26 S.W.2d 457 (Tex.Civ. App. 1930, n.w.h.) 18

Page

Winslow v. Baltimore & O.R. Co., 208 U.S. 59, 28 S.Ct. 190, 52 L.Ed. 388 (1908) 10

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) 15

Constitutional Provisions, Statutes and Rules

Texas Constitution, Art. I, Sec. 17 16

U.S. Constitution, Art. VI, Clause 3 15

U.S. Constitution, Fifth Amendment 16

Art. 199a, Sec. 3.028, V.A.T.S. 7

Art. 1435, V.A.T.S. 16

Art. 1436, V.A.T.S. 16

Art. 1438, V.A.T.S. 16

Art. 3268, V.A.T.S. 9, 13

U.S. Sup. Ct. Rule 23 5

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No.....

DR. DON M. SMART,

Petitioner,

v.

TEXAS POWER & LIGHT COMPANY, et. al.,

Respondents.

RESPONDENT TEXAS POWER & LIGHT COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent prays this Honorable Court to deny the Petition for a Writ of Certiorari for the reason that the judgment below is correct, just, and supported by an unbroken legion of decided cases in point including cases heretofore decided by this Honorable Court.

PREFACE

The Petition for Writ of Certiorari is yet another chapter in a tome of harassing, vexatious and frivolous attempts (first commenced over twenty years ago in 1955) by Petitioner or his attorney to burden the courts with their disagreement with the

philosophy that public service corporations have properly been granted by the State the power to take private property for a public purpose upon the payment of just compensation.

In 1955, Petitioner's attorney, S. L. Lewis, challenged the authority of Texas Power & Light Company, Respondent herein, to survey his land preparatory to its filing a condemnation action. The Texas Court of Civil Appeals affirmed an injunction granted by the trial court restraining Lewis from interfering with the survey. *Lewis v. Texas Power & Light Company,* 276 S.W.2d 950 (Tex.Civ.App. 1955, *error ref'd., n.r.e.)*

During the pendency in the state courts of the Lewis condemnation suit, referred to above and involving the same tract of land, S. L. Lewis, on behalf of his sister, brought an action in the United States District Court against Texas Power & Light Company and its parent company challenging the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Baber v. Texas Utilities Company, et al* (D.C.Tex.1955) 128 F.Supp. 753, affd., 5 Cir., 228 F.2d 665 (1956).

In 1972, Petitioner's attorney, S. L. Lewis, instituted an action in the United States District Court against Texas Power & Light Company, its parent and associated companies, and substantially all other electric and gas utility companies in Texas, again attacking the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Lewis v. Texas Power & Light Company, et al,* 5 Cir., 462 F.2d 1318 (1972).

While the above case, *Lewis v. Texas Power & Light Company,* was pending in the 5th Circuit and before its decision,

Lewis filed in the U.S. Supreme Court his petition for Writ of Mandamus and in the alternative for Writ of Certiorari against the Chief Judge of the 5th Circuit and the trial Judge, seeking reinstatement of the case on the trial docket. This Court denied the motion. *Lewis v. John R. Brown, Chief Judge, et al,* 404 U.S. 819, 92 S.Ct. 74, 30 L.Ed.2d 119 (1971).

In 1972, Don Smart, represented by the same S. L. Lewis who instigated the previous actions, brought the instant suit against Texas Power & Light Company and the Governor and Attorney General of Texas, again alleging the invalidity of the Texas condemnation laws in regard to a condemnation suit filed in Collin County, Texas, in 1970. The action of the trial court in dismissing the action was affirmed by the 5th Circuit. *Don Smart v. Texas Power & Light Company, et al,* 5 Cir., 525 F.2d 1209 (1976). From such action, plaintiff now seeks Writ of Certiorari from this Court.

Later in 1972, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against the Dallas County Sheriff and his deputies, the Dallas County District Attorney, the Dallas County Criminal Judge and the Rockwall County District Judge in whose court a 1972 Don Smart condemnation proceeding was pending, alleging false arrest in connection with Smart's allegedly interfering with service of process in the condemnation proceedings. The 5th Circuit affirmed a judgment against the plaintiff. *Nancy Gayle Smart v. Jones,* 5 Cir., 493 F.2d 663 (1974), reh.den. 495 F.2d 1372. This Court denied petition for Writ of Certiorari, 419 U.S. 1090, 95 S.Ct. 681, 42 L.Ed.2d 682

(1974), and denied petition for rehearing, 420 U.S. 939, 95 S.Ct. 1151, 43 L.Ed.2d 417 (1975).

In 1973, Don Smart, represented by S. L. Lewis, brought a civil rights action in the U.S. District Court against the Dallas County Sheriff and his deputies, the District Attorney and his assistants, and Texas Power & Light Company and its president and its attorney, alleging the invalidity of the Texas condemnation laws and false arrest arising out of Smart's allegedly interfering with the service of process upon him in the condemnation suit involved in the instant controversy in which he has petitioned this Court for a Writ of Certiorari. The trial court granted defendant's motion for summary judgment, and upon plaintiff's appeal, the 5th Circuit affirrmed. *Don Smart v. Jones, et al,* 5 Cir., 530 F.2d 64 (1976).

In 1974, Scott Smart, the brother of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its attorney and the District Judge of Collin County, Texas, in which the instant Don Smart condemnation suit is pending, alleging the invalidity of the Texas condemnation laws and that the Collin County proceedings were void because of his non-joinder as a party. This Scott Smart suit involves the same condemnation involved in the case at bar. The trial court dismissed the action because of Scott Smart's lack of standing by reason of his claim under a conveyance which was unrecorded until 2½ years after commencement of the Collin County proceedings. The 5th Circuit affirmed the dismissal. *Scott Smart v. Texas Power & Light Company, et al,* 5 Cir., 525 F.2d 1211 (1976). Scott Smart has recently petitioned this Court for a Writ of Certiorari.

Later in 1974, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its president and attorney, alleging the invalidity of the Texas condemnation laws and deprivation of her constitutional rights, said action being based upon the same facts and occurrence as she had alleged in her previous action against the Dallas County Sheriff, et al. Defendants' motion to dismiss this action on the ground of *res judicata* and collateral estoppel is pending in the trial court. *Nancy Gayle Smart v. Texas Power & Light Company, et al,* No. CA3-74-870-F in the U.S. District Court for the Northern District of Texas, Dallas Division.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is an unsupportable legal argument rather than a statement of the "facts material to the consideration of the questions presented" as required by U.S. Sup. Ct. Rule 23(e). Moreover, most of the alleged "factual" statements are completely *de hors* the record and were not even mentioned in any of the briefs or motions filed by Petitioner in the Court of Appeals. For example, neither Dr. Scott Smart nor J. E. Abernathy were mentioned in Petitioner's appeal to the Fifth Circuit and there is absolutely no summary judgment evidence in this case concerning either of these two gentlemen except the signature of Mr. Abernathy to the Petition filed on behalf of Respondent in the state condemnation proceeding (R., p.135). While entirely *de hors* the record and completely immaterial, Mr. Abernathy did at one time represent Don Smart's predecessors-in-title to the land in question but he did not represent Don Smart or his brother, Scott Smart.

Furthermore, notwithstanding Petitioner's bald assertion to the contrary, the condemnation was properly authorized by Respondent's Board of Directors (See, *e.g.*, Deposition of T. L. Austin, Jr., pp. 11-12, 15, 25-26, 62-68, and R., pp. 223-229).

Respondent will defer answering the legal arguments contained in Petitioner's "Statement of the Case" to the section entitled "Reasons for Denying a Writ," *infra*. The facts material herein are as follows:

This suit was instituted by Smart on August 25, 1972, seeking, *inter alia*, to enjoin Respondent from exercising any right under the Texas condemnation laws over his property and for a declaratory judgment declaring the invalidity of the Texas condemnation laws (R., pp.1-13). On September 1, 1970, almost two years before the instant action was begun, Respondent instituted condemnation proceedings in the County Court of Collin County, Texas, seeking to condemn an easement across Smart's land for the construction of electric transmission lines to serve the public (R.,pp. 131-135 and 151). Special Commissioners were duly appointed and a hearing was had after which the Special Commissioners rendered an Award of $34,000.00 as the damages suffered by the landowners by reason of the condemnation (R., p.137). Respondent, on November 4, 1970, in accordance with the applicable statutory provisions, deposited the sum of $68,000.00 into the registry of the state court and executed the requisite bond taking possession of the easement being condemned (R.,pp. 143, 145 and 154). On May 13, 1971, Smart withdrew from the registry of the court the full amount of the Award of the Special Commissioners in the form of a check payable to Smart and the

other defendants-in-condemnation in the sum of $34,000.00 (R.,p. 154 and 152). The check has been cashed by Smart, et al (R.,p. 154).

The condemnation case was transferred from the County Court to the 199th Judicial District Court of Collin County, Texas by virtue of Art. 199a, Sec. 3.028, V.A.T.S. The condemnation proceedings are presently pending as Cause No. 71-159-199 in the 199th Judicial District Court (R.,pp. 152 and 154-155).

The Courts below did not reach the constitutional questions raised by Smart and did not pass upon those questions because Smart's withdrawal and acceptance of the Award of the Special Commissioners precludes Smart from challenging Respondent's right to condemn the subject easement and from contesting the jurisdiction of the condemnation court.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals correctly held that Smart is precluded from contesting Respondent's right to condemn and the jurisdiction of the condemnation court since Smart withdrew and accepted the Award made by the Special Commissioners.

The Texas law is most clear to the effect that, where the condemnee withdraws the Award of the Special Commissioners deposited in the registry of the condemnation court by the condemnor, the condemnee is precluded from thereafter contending that the condemnation was unlawful. The condemnee's acceptance of the Award constitutes a consent to the taking and to the jurisdiction of the condemnation court to award the

easement to the condemnor. In such a case, the only justiciable issue which remains is the issue of just compensation. *State v. Jackson,* 388 S.W.2d 924, 925-926 (Tex.1965); *City of San Antonio v. Grandjean,* 91 Tex. 430, 41 S.W. 477, 479 (1897); and *McConnico v. Texas Power & Light Company,* 335 S.W.2d 397, 399-400 (Tex.Civ.App. 1960, *error ref'd., n.r.e)*

Smart quarrels with the holding in *State v. Jackson* that awarded the condemnee only nominal damages for the 0.018 acres involved in that case. Smart, however, does not tell the Court why the condemnee was awarded only nominal damages. While that part of the holding is completely immaterial to the case at bar, the nominal damages were awarded since the condemnee "filed no answer and introduced no evidence as to the value of the 0.018 acre tract of land." The established rule, of course, is that the burden of proving the value of the land taken is on the condemnee. The Texas rule on the burden of proof is identical to the rule applicable in Federal condemnations. *United States ex rel. T.V.A. v. Powelson,* 319 U.S. 266, 273, 63 S.Ct. 1074, 87 L.Ed 1390, 1396-1397 (1943); *United States v. Certain Parcels of Land, Etc.,* 5 Cir., 149 F.2d 81, 82 (1945); *United States v. Smith,* 5 Cir., 355 F.2d 807, 809 (1966); and *United States v. 25.02 Acres of Land, Douglas County, Colo.,* 10 Cir., 495 F.2d 1398, 1400-1401 (1974). Thus, since the condemnee offered no evidence relating to value, the Court in *State v. Jackson* had no alternative but to assess nominal damages.

Smart also quarrels with the rule that the amount withdrawn by the condemnee is subject to partial divestiture where the fact-finder on the appeal from the Commissioners' Award fixes

just compensation at a figure less than that fixed by the Special Commissioners. This Honorable Court held that the same constitutional arguments advanced herein by Smart were "unsound" in *United States v. Miller*, 317 U.S. 369, 381-382, 63 S.Ct. 276, 87 L.Ed. 336, 346-347 (1943).

The Texas condemnation laws are plainly fair to the condemnee. Art. 3268, V.A.T.S., requires the condemnor to deposit double the Commissioners' Award and execute an appropriate bond insuring the ready availability of funds to satisfy the requirement of payment of just compensation before the condemnor takes possession of the land being condemned. The statute also provides that, in the event that it is ultimately adjudged that there was no right to condemn, the deposit stands as security for any and all damages suffered by the condemnee on account of the condemnor's temporary possession. Where it is found that the right to condemn exists or where the condemnee has withdrawn the Commissioners' Award, the condemnee is assured by the statute of receiving "just compensation." And, where such "just compensation" is ultimately determined to be more than the Commissioners' Award, the condemnee is additionally compensated by way of interest on the amount of the excess from the date that the condemnor takes possession. *Housing Authority of City of Dallas v. Shambry*, 252 S.W.2d 963, 966 (Tex.Civ.App.1952, *error ref'd, n.r.e.* at *Id.*, 152 Tex. 122, 255 S.W.2d 184, 185). The Texas rule pertaining to payment of interest is precisely the rule applicable in Federal condemnations. *United States v. Dow*, 357 U.S. 17, 22, 78 S.Ct. 1039, 2 L.Ed.2d 1109, 1114 (1958). Where, however, the "just compensation" is ultimately fixed at

a sum less than the Commissioners' Award, the condemnee (even though he has withdrawn the full amount of the Commissioners' Award) is merely obligated to return the excess he has previously received; he is not obligated to pay interest on such excess. *Maddox v. Gulf, Colorado & Santa Fe Railroad Co.*, 293 S.W.2d 499, 507 (Tex.Civ.App. 1956, *error ref'd., n.r.e.)* and *Gossett v. State*, 417 S.W.2d 730, 737 (Tex.Civ.App. 1967, *error ref'd., n.r.e.)*

The Texas rule, that the condemnee's withdrawal and acceptance of the Commissioners' Award precludes the condemnee from thereafter claiming that the condemnation is unlawful, is, certainly, constitutionally permissible. Such a rule was expressly approved in *Winslow v. Baltimore & O.R. Co.*, 208 U.S. 59, 62, 28 S.Ct. 190, 52 L.Ed. 388, 390 (1908). See also *Robnison v. Transcontinental Gas Pipe Line Corporation* (D.C.Ga. 1969) 306 F.Supp. 201, 208, aff'd at *Id.*, 5 Cir., 421 F.2d 1397 (1970) cert.den. 398 U.S. 905, and compare *United States v. Certain Parcels of Land, Etc.* (D.C.Ohio 1957) 149 F.Supp. 696, 700.

Smart's withdrawal and acceptance of the Commissioners' Award precludes him from challenging Respondent's right to condemn the subject easement. Smart's withdrawal constitutes a consent to the right to condemn and to the jurisdiction of the state court to award the easement to Respondent upon payment of full "just compensation" as ultimately determined on Smart's appeal to the 199th Judicial District Court of Collin County, Texas. The only justiciable issue now remaining between the parties is the issue of "just compensation."

The courts below were eminently correct in dismissing Smart's suit because of his withdrawal and acceptance of the $34,000.00 Commissioners' Award on May 13, 1971 — some fifteen months before he filed this action in Federal Court. The law is settled and just. The constitutionality of such law is beyond reproach. The Writ should be denied.

II.

The dismissal of Smart's suit is additionally correct under the doctrine of laches since Smart waited almost two years since the institution of the condemnation proceedings before filing the present action, the transmission lines having long since been constructed across the subject easement.

The condemnation proceedings were instituted in state court on September 1, 1970 (R., pp. 131-135 and 151). Not only did Smart withdraw and accept the Commissioners' Award but he also permitted the construction of the transmission lines on the easement without taking any action challenging Respondent's right to condemn the easement until he filed the present action on August 25, 1972 (R.,pp. 151-152). If ever the doctrine of laches were applicable, that doctrine is applicable in the case at bar. Precisely in point is *Robinson v. Transcontinental Gas Pipe Line Corporation* (D.C.Ga. 1969) 306 F.Supp. 201, 208, aff'd, *Id.*, 5 Cir., 421 F.2d 1397 (1970) cert.den. 398 U.S. 905.

The law is well-established that a condemnee cannot sit idly by and suffer the condemnor to make valuable improvements on the land and then attempt to oust the condemnor; the condemnee is, in such a case, relegated to his recovery of damages. *Northern Pacific Railroad Co. v. Smith,* 171 U.S. 260, 271-

275, 18 S.Ct. 794, 43 L.Ed. 157, 161-163 (1898); *Lacy v. United States,* 5 Cir., 216 F.2d 223, 225 (1954); and *Dickinson v. Brown-Crummer Inv. Co.,* 10 Cir., 137 F.2d 615, 618 (1943).

The transmission lines have long since been built on the easement through Smart's land. Smart waited almost two years from the time of the institution of the condemnation proceedings before filing the instant action. Smart withdrew and accepted the Commissioners' Award over fifteen months before filing the instant action. Laches provides yet another reason for the denial of the Writ.

III.

Smart's contention with respect to interest affords him no right of relief in this action.

Smart's contention that the Texas condemnation laws are invalid because of no provision for payment of interest is not only unsound but it is an argument which Smart has no standing to make in this action. Since Smart withdrew and accepted the Commissioners' Award, he is precluded from challenging the lawfulness of the condemnation as established in section I, *supra.* The withdrawal and acceptance of the Commissioners' Award, moreover, certainly precludes Smart from complaining of the lack of any interest on the amount of the Award. Smart has the money — and has had it for five years—to invest and reinvest as he pleases. The deposit was made prior to Respondent taking possession; indeed, it is a condition precedent to taking possession.

Where there is a taking without a deposit (inverse condemnation), the condemnee is entitled to interest from the date of

taking. *Brunson v. State*, 444 S.W.2d 598, 602 (Tex. 1969). Where, as here, a deposit is made — there are two possibilities under Art. 3268, V.A.T.S., *viz.* (1) Where it is ultimately found that no right to condemn exists, the deposit stands as security for the payment to the condemnee of all damages occasioned by the condemnor's temporary possession of the property, and (2) Where it is ultimately found that there is a right to condemn, the deposit is considered a tender to the condemnee and, certainly, no interest is due on sums deposited for the account of the condemnee which he can withdraw and use at his pleasure. *Housing Authority of City of Dallas v. Shambry*, 252 S.W.2d 963, 966 (Tex.Civ.App.1952, *error ref'd., n.r.e.* at *Id.*, 152 Tex. 122, 255 S.W.2d 184, 185) and *Fort Worth Concrete Co. v. State*, 400 S.W.2d 314, 317 (Tex. 1966). And, as previously established in section I, *supra*, the condemnee is entitled to recover interest on any excess in the event that his "just compensation" is ultimately fixed in an amount greater than the Commissioners' Award. See also *Trinity River Auth. of Tex. v. Sealy & Smith Found.*, 435 S.W.2d 864, 865 (Tex. 1968). As held in *United States v. Miller*, 317 U.S. 369, 382, 63 S.Ct. 276, 87 L.Ed. 336, 347 (1943), the deposit is a "provisional and not a final settlement with the owner; it is a payment 'on account of' compensation and not a final settlement of the amount due." In short, the deposit is not unlike a down-payment with any balance due (after the final determination of "just compensation") being payable with interest.

Smart's attempt to both have his cake and eat it too affords absolutely no reason for granting the Writ.

IV.

The condemnation proceedings presently pending in state court were validly instituted.

On pages 8-9 of his Petition, Smart claims that two fatal deficiencies exist in the presently pending condemnation proceedings. Each of these claims is false and not supported in the record.

Again, Smart goes outside the record in this case when he speaks of his brother, Scott Smart. Again, Scott Smart's name was not even mentioned in Smart's briefs and motions filed in the Court of Appeals. If the case cited by Smart, *Dr. Scott Smart v. Texas Power & Light Company*, 5 Cir., 525 F.2d 1211, 1212 (1976), is *res adjudicata* on anything, it is *res adjudicata* on the point that Dr. Scott Smart's interest in the subject tract was not a matter of record until two and one-half years after the institution of the condemnation proceedings and that Respondent did not have knowledge of Scott Smart's alleged interest until his deed was recorded.

The second contention to the effect that Respondent did not have proper corporate authorization for the condemnation is in the face of the uncontroverted facts in this record (See, *e.g.*, Deposition of T. L. Austin, Jr., pp. 11-12, 15, 25-26, 62-68, and R., pp. 223-229).

Thus, it is seen that Smart's contentions are false and in the face of the record in this case. Of course, these contentions do not even purport to present a Federal question but instead present questions peculiar to state law which are more properly to be decided by the state condemnation court. Moreover, by

withdrawing and accepting the Commissioners' Award, Smart has consented to Respondent's right to condemn the subject easement as established in section I, *supra*. Again, no reason exists for granting a Writ.

V.

Even if Smart were permitted to challenge the Texas condemnation laws, still the Federal Courts should abstain under the principles of equity, comity, and federalism since the condemnation proceedings are presently pending in the state court which is an entirely competent tribunal firmly bound to the Constitution.

Judges of the state courts are firmly bound to the Constitution, laws and treaties of the United States. Art. VI, Clause 3, U.S. Constitution. Of course, there is always the ultimate right of appeal to this Honorable Court from the state courts. The absention doctrine, based upon the principles of equity, comity, and federalism, is clearly applicable under the clear guidelines of *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) and *Younger v. Harris*, 401 U.S. 37, 49, 91 S.Ct. 746, 27 L.Ed.2d 669, 678-679 (1971). Indeed, the absention doctrine has been repeatedly applied to suits challenging state condemnation proceedings. *Martin v. Creasy*, 360 U.S. 219, 79 S.Ct. 1034, 3 L.Ed.2d 1186 (1959); *Cavanaugh v. Looney*, 248 U.S. 453, 39 S.Ct. 142, 63 LEd 354 (1919); *Baber v Texas Utilities Co.*, 5 Cir., 228 F.2d 665, 666 (1956); *Lewis v. Texas Power & Light Company*, 5 Cir., 462 F.2d 1318, 1319 (1972); and *Hill v. Victoria County Drainage District No. 3*, 5 Cir., 441 F.2d 416 (1971).

The Writ should be denied, additionally, under the established absention doctrine "since interference with a state judicial

proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman v. Pursue, Ltd., supra.*

VI.

Even if Smart were permitted to challenge the Texas condemnation laws, it is clear that said laws meet the tests of due process.

There can be no doubt but that Respondent's condemnation is for a public purpose and that Respondent, a public utility company enjoined by state statute to provide service to the public on a non-discriminatory basis, has been validly delegated the power of eminent domain. Arts. 1435, 1436 and 1438, V.A.T.S. and *Arcola Sugar Mills Co. v. Houston Lighting & Power Co.*, 153 S.W.2d 628, 633 (Tex.Civ.App.1941, *error ref'd, W.M.).* Perhaps, the necessity for, and propriety of, the delegation of such power to public utilities has never been more eloquently stated than by Mr. Justice Holmes in *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507, 511 (1916). See also *The Mississippi and Rum River Boom Company v. Patterson*, 98 U.S. 403, 25 L.Ed. 206, 207-208 (1879). The payment of "just compensation" is assured by the Texas statutes, the Texas Constitution (Art. I, Sec. 17) and by the Texas case law as established in sections I and III, *supra,* as well as by the Fifth Amendment to the United States Constitution. Substantive due process, therefore, is assured.

Procedural due process is similarly assured. The Texas laws provide for due notice and a meaningful and timely hearing on all questions the condemnee may want to litigate. In view of Smart's contention in this case, however, it should be pointed out that, since the power of eminent domain is a basic attribute of sovereignty and a necessary governmental power vested in the states for the common good [*Louisiana Power & Light Co. v. Thibodeaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959) and *Green Street Association v. Daley*, 7 Cir., 371 F.2d 1 (1967) cert. den. 389 U.S. 849], there is no constitutional requirement for the condemnee to be heard on the question of the necessity of the taking prior to institution of the condemnation proceedings or the taking of possession under the required statutory deposit and bond. *Georgia v. Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 (1924); *Bragg v. Weaver*, 251 U.S. 57, 40 S.Ct. 62, 64 LEd 135 (1919); *Joslin Mfg Co. v. Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed 1167 (1923); *North Laramie Land Co v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925); *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893); *Louisville and Nashville Railroad Company v. Western Union Telegraph Company*, 250 U.S. 363, 39 S.Ct. 513, 63 L.Ed. 1032 (1919); *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 LEd. 904 (1930); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *2,953.15 Acres of Land v. United States*, 5 Cir., 350 F.2d 356 (1965); and *Joiner v. City of Dallas* (D.C.Tex.1974) 380 F.Supp. 754, 764-779, aff'd. at *Id.*, 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974) reh. den. 419 U.S. 1132.

Not only under the above authorities does the appeal from the Commissioners' Award itself provide the condemnee with a meaningful and timely hearing, but Texas law provides the condemnee with several other procedures and remedies for testing the condemnee's right to take. For example, an injunction suit may be prosecuted if the condemnation proceedings are void [*Lone Star Gas Co. v. City of Fort Worth,* 128 Tex. 392, 98 S.W. 2d 799 (1936) and *Dallas County v. Plowman,* 99 Tex. 509, 91 S.W. 221 (1906)], where the condemnor's act is illegal [*Bowers v. City of Taylor,* 16 S.W.2d 520 (Tex.Com. App.1929) and *Floyd v. Turner,* 23 Tex. 592 (1859], where the condemnor has appropriated land other than that described in the condemnation decree [*San Antonio v. Sullivan,* 57 S.W. 45 (Tex.Civ.App.1900, *error ref'd.*); *Fort Worth & R.G.R. Co. v. Jennings,* 76 Tex. 373, 13 S.W. 270 (1890); and *Stone v. Wylie,* 34 S.W.2d 842 (Tex.Com.App.1931)], or where the land has been appropriated without payment therefor [*McCammon & Lang Lumber Co. v. Trinity & B.V. Ry. Co.,* 104 Tex. 8, 133 S.W. 247 (1911); *West Texas Utilities v. Lee,* 26 S.W.2d 457 (Tex.Civ.App.1930, n.w.h.); *Koslosky v. Texas Electric Service Co.,* 213 S.W.2d 853 (Tex.Civ.App.1948, *error ref'd.);* and *Scott v. City of Robinson,* 404 S.W.2d 330 (Tex.Civ.App. 1966, *error ref'd., n.r.e)*]. Additionally, the condemnee can test his contention that the condemnor is proceeding under an unconstitutional statute in a trespass to try title action. *Buffalo Bayou, etc. Railroad Co. v. Ferris,* 26 Tex. 588 (1863).

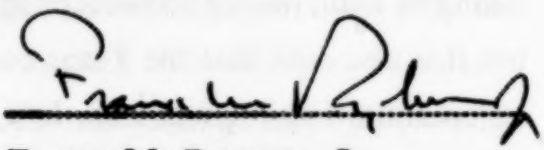
Thus, it is clear, from a legion of cases, that Smart's due process argument is specious. Not only does Smart not have the right to make the argument in view of his consent to the taking by withdrawing and accepting the Commissioners' Award, but it is also seen that the Texas condemnation laws fully meet all constitutional requirements. It is, therefore, respectfully submitted that the Writ must be denied for this additional reason.

CONCLUSION

There is absolutely no merit to Petitioner's Petition for Writ of Certiorari — no more merit than was found in the long line of frivolous cases and appeals dating back to the 1950's brought by Petitioner and/or his attorney outlined in the Preface, *supra*. Having taken the benefits of the condemnation by withdrawing and accepting the Commissioners' Award, Smart can neither challenge Respondent's right to condemn the subject easement nor can he attack the jurisdiction of the state condemnation court to award the easement to Respondent upon the payment of "just compensation." The doctrine of laches provides yet another ground precluding Smart from attempting to oust Respondent whom Smart suffered to make valuable improvements to the easement. If, however, Smart had not taken advantage of the provisions of the Texas condemnation laws, his contentions can only be characterized as specious since the condemnation proceedings in question were validly instituted under laws which meet and satisfy every constitutional requirement. The judgments below are correct and just.

WHEREFORE, **Respondent prays this Honorable Court to DENY a Writ of Certiorari in this case.**

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Frank M. Ryburn, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing "Respondent Texas Power & Light Company's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" by mailing three copies of same by United States mail, postage prepaid, on June 17, 1976, to each: Mr. S. L. Lewis, 5614 Richmond Street, Dallas, Texas 75206, counsel of record for Petitioner; Dr. Don M. Smart, 10611 Garland Road, Dallas, Texas 75218, Pro Se; and Mr. David R. Thomas, Assistant Attorney General of Texas, 2930 Turtle Creek Plaza, Suite 114, Dallas, Texas 75219, counsel of record for Respondents Hon. Dolph Briscoe and Hon. John Hill.

Frank M. Ryburn, Jr.

Supreme Court, U. S.
FILED
JUN 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1701

* * *

DR. DON M. SMART,

Petitioner

V.

TEXAS POWER & LIGHT COMPANY, GOVERNOR DOLPH BRISCOE AND ATTORNEY GENERAL JOHN L. HILL,

Respondents

* * *

REPLY OF RESPONDENTS DOLPH BRISCOE, GOVERNOR OF TEXAS, AND JOHN L. HILL, ATTORNEY GENERAL OF TEXAS, TO THE PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

Page

QUESTION PRESENTED 1

STATEMENT OF THE CASE 1

ARGUMENT AND AUTHORITIES FOR DENYING PETITIONER'S WRIT OF CERTIORARI 2

CONCLUSION 10

CERTIFICATE OF SERVICE 11

LIST OF AUTHORITIES

CASES

Bell v. Burson, 402 U.S. 535 (1971) 7

Brazos River Conservation and R. Dist. v. Costello, 135 Tex. 307, 143 S.W.2d 577 (1940) 9

Burch v. City of San Antonio, 518 S.W.2d 540 (Tex. 1975) 6

City of Fort Worth v. Corbin, 504 S.W.2d 828 (Tex. 1974) 5

Fuentes v. Shevin, 407 U.S. 67 (1972) 7

Gibson v. Berryhill, 411 U.S. 564 (1973) 9

Goldberg v. Kelly, 397 U.S. 254 (1970) 7, 8

Joiner v. City of Dallas, 380 F. Supp. 754, aff'd, 419 U.S. 1042 (1974) 2, 7, 10

Lone Star Gas Co. v. City Fort Worth, 128 Tex. 392, 98 S.W.2d 799 (1936) 9

Lynch v. Household Finance Corp. 405 U.S. 538 (1972) 7

LIST OF AUTHORITIES, cont.

CASES, cont. Page

Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) 7

Smart v. Texas Power & Light Co., 525 F.2d 1211 (5th Cir. 1976) 5

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 7

State v. Jackson, 388 S.W.2d 924 (Tex. 1965) 2, 3

Thomas v. Housing Authority of City of Dallas, 153 Tex. 137, 264 S.W.2d 93 (Tex. 1953) 4

Tonahill v. Gulf States Utilities Company, 446 S.W.2d 301 (Tex. 1969) 9

STATUTES

Tex. Rev. Civ. Stat. Ann. art. 1436 6

Tex. Rev. Civ. Stat. Ann. art. 3264-3271 2

Tex. Rev. Civ. Stat. Ann. art. 3268 8

CONSTITUTIONAL PROVISIONS

Tex. Const. art. 1, sec. 17 ..... 5, 8

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* * *

QUESTION PRESENTED

Respondents respectfully suggest that the only question presented by the Petitioner's Writ of Certiorari is whether the Court of Appeals correctly affirmed the District Court's dismissal of the Petitioner's cause of action to void the taking of his property through an eminent domain proceeding presently pending in State Court because the Petitioner had previously consented to such taking by accepting the money awarded him at the initial hearing in the State proceeding.

STATEMENT OF THE CASE

Dolph Briscoe, Governor of the State of Texas, and John L. Hill, Attorney General of the State of Texas, are

Respondents in this cause. The predecessors in their respective offices were original Defendants in the United States District Court action filed by the Petitioner. The Respondent State officials were substituted as Defendants after assuming office. Neither Respondent nor his predecessor in office were parties to or had any interest in the eminent domain proceeding filed by Respondent Texas Power & Light Company to acquire an electric transmission line across property belonging to the Petitioner. The interest of the Respondents in this cause arises from their constitutional duty and obligation to preserve, protect and defend the laws and statutes of the State of Texas.

The Petitioner seeks to challenge the constitutionality of articles 3264-3271 of the Texas Civil Statutes, which contain the general procedural law governing the exercise of the power of eminent domain in the State of Texas, despite the recent decision upholding the constitutionality of that body of statutes in *Joiner v. City of Dallas*, 380 F. Supp. 754, *aff'd*, 419 U.S. 1042 (1974).

The Respondent State officials accept as correct the factual statements in the second paragraph of Petitioner's Statement of the Case. The Petitioner's statement of the holding in *State v. Jackson*, 388 S.W.2d 924 (Tex. 1965), however, is neither complete nor accurate. The statement of the Petitioner that a landowner is not compensated at the time he is dispossessed of his property by a taking pursuant to the eminent domain statutes of Texas is wholly fallacious and in direct conflict with the applicable provisions in the Texas Constitution.

ARGUMENT AND AUTHORITIES FOR DENYING PETITIONER'S WRIT OF CERTIORARI

The dismissal of Petitioner's cause of action by the

District Court was correct for several reasons. First, Petitioner's argument based on *State v. Jackson, supra,* is without any reasonable foundation. The doctrine of laches and the Petitioner's withdrawal of the monetary award tendered by Respondent Texas Power & Light precludes him from presenting the issues he sets forth in this Petition. Secondly, Petitioner's due process claim as to interest payable on the monetary award at issue here is unsupportable. Finally, Petitioner's arguments attacking the constitutional vitality of the statutes under which the condemnation occurred are without support in either the decisions of this Court or of State Courts. Each of these responses to the Petitioner's arguments will be explored below.

I.

The Petitioner distorts the holding in *Jackson.* Contrary to his argument, the rule of law in *Jackson,* upon which the District Court based its Order dismissing the Petitioner's action, is separate and distinct from the issue concerning the amount of compensation recoverable by a property owner in an eminent domain proceeding. *Jackson* holds that a property owner's withdrawal of the money awarded him at the initial hearing in an eminent domain proceeding manifests the owner's consent to the taking of his property. On the matter of compensation, *Jackson* states unequivocally that the property owner offered no evidence at the trial as to the monetary value of the property taken from him, thus no value evidence by the property owner was presented for the condemning authority to refute. It is difficult to conceive that such an active litigant as the Petitioner would stand mute on the issue of value at the trial of the eminent domain case involving his property. The holding in *Jackson* concerning consent to the taking by the property owner

conforms with previous holdings of Texas Courts. *See Thomas v. Housing Authority of City of Dallas*, 153 Tex. 137, 264 S.W.2d 93 (Tex. 1953).

The refusal of a property owner to accept the monetary tender made by the condemning authority places the authority on notice that its right to take the property may be challenged. Conversely, should a property owner be permitted to maintain an attack upon the validity of the eminent domain taking after he has accepted such monetary tender, the entire project from which the need for the taking arises would be jeopardized unless the condemning authority litigates to finality the issue of the right to take the property. In this case, the transmission lines of the Respondent Power Company had been erected and were already in operation across the property condemned before the Petitioner instituted his Federal Court action seeking to overturn the taking.

If Petitioner had been genuinely interested in obtaining a judicial determination of the right of the Respondent Texas Power & Light Company to place a transmission line across his property, the Petitioner could have done so months before he accepted the money awarded him in the State eminent domain proceeding by electing to present the issue of the right to take to the State Court. Then and there he could have contested not only that issue, but also the amount of compensation to which he was entitled as a result of that acquisition. Instead, he withdrew the money awarded at the initial stage of the State eminent domain proceeding and nearly two years thereafter attacked the State proceeding in Federal Court.

II.

Petitioner presents the argument that the eminent domain statutes of Texas are invalid because they fail to

require the condemning authority to pay interest to a property owner from the day it takes his property. The date of taking in an eminent domain proceeding is established by the date the condemning authority makes available to the property owner the amount of money awarded at the initial hearing stage of the condemnation proceeding. *City of Fort Worth v. Corbin*, 504 S.W.2d 828 (Tex. 1974). This procedure is in accordance with section 17 of article 1 of the Texas Constitution, which provides:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . ."

In this case, not only was the award made available, but Petitioner withdrew it. Whether he reinvested the money in securities or other property or made some other use of it is unknown. Petitioner's argument concerning the amount of interest he should have received on the money he accepted from the Respondent Power Company fails to take into consideration, nor does Petitioner account for, income generated to Petitioner by the award from the time he received it in 1970 until the present.

III.

Petitioner also argues that the eminent domain proceeding is void because his brother, Dr. Scott Smart, was not made a party to the proceeding by the Respondent Power Company. The interest of Dr. Scott Smart was considered in *Smart v. Texas Power & Light Co.*, 525 F.2d 1211 (5th Cir. 1976). Dr. Scott Smart did not record instruments establishing his interest in the

property until two and one-half years after the eminent domain proceeding was filed. This disclosure of Dr. Scott Smart's interest also occurred after the Petitioner accepted the money awarded him at the initial hearing in the proceeding. Furthermore, Dr. Scott Smart acquired his interest in the property from the title held by the Petitioner. It was Dr. Scott Smart's decision alone to delay the disclosure of his interest in the property. The suggestion that the belated disclosure is justification for voiding the eminent domain proceeding defies reason.

The defects that the Petitioner alleges occurred in the proceeding before he accepted the money award, assuming *arguendo*, that those defects were sufficient to invalidate the proceeding, became moot by this subsequent manifestation of the Petitioner's consent to the taking.

Neither does the decision in *Burch v. City of San Antonio*, 518 S.W.2d 540 (Tex. 1975) render the proceeding void. In *Burch*, the property owner sought to enjoin a condemnation proceeding instituted by an entity allegedly not authorized to exercise the power of eminent domain. The opinion discusses the limitations placed by the Texas Legislature upon the use of the power of eminent domain by Home Rule Cities and, in particular, the authority of the City Council of San Antonio to delegate the power of eminent domain to a Board of Trustees of its Water Works. The eminent domain proceeding challenged by the Petitioner was instituted by the Respondent Texas Power & Light Company, pursuant to the authority of article 1436 of the Texas Civil Statutes, which authorizes electric utility companies to bring such proceedings. *Burch*, therefore, has no application in this case.

Petitioner's contention that a taking under the Texas statutes governing the exercise of the power of eminent domain is unconstitutional because it does not

provide for a hearing on the right to take the property at a meaningful time before the property is taken is in direct conflict with the decision in *Joiner v. City of Dallas, supra.*

Commencing with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); continuing with *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971); *Lynch v. Household Finance Corp.*,405 U.S. 538 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), this Court has determined the constitutionality of the taking of one's property by examining the sufficiency of the notice to the owner before the taking and the opportunity for a hearing afforded him before his property was taken. In each case, the nature of the property right sought to be taken and the statutory authorization for its taking were examined. Although these cases yield no fail-safe formula establishing the requirements for procedural due process, they do make it apparent that the important concern is whether the "taking" is of sufficient stature to justify postponing resolution of the "right to take" issue until after the taking has been initiated. None of these reasons countenance the lack of an adjudication of the right to take. It is elementary that procedural due process requirements are neither technical nor formal. *Mitchell* recognizes that a taking of property can involve the interests of someone other than the person in possession, and that such interests are also entitled to consideration in making an assessment of the constitutional propriety of a taking.

It cannot seriously be contended that the Respondent Texas Power & Light Company, needing possession of an easement over the Petitioner's property in the furtherance of a project to fulfill its commitment to supply electricity to its customers, has no interest in that property worthy of consideration. Such a

proposition would completely disregard the extensive public ramifications attached to the transmission of electrical energy. Neither *Goldberg* nor any of the other cases cited by the Petitioner involved the acquisition of a person's property for public use. Their areas of concern were with redress between the individuals or the retention of individual benefits. In such situations, unlike eminent domain, compensation for the "taking" is not contemplated.

The Petitioner's argument is founded on the implicit premise that the power to take a person's property for public use without his consent is on the same level as statutory remedies, such as garnishment, or such important but wholly individual concerns as retention of a driver's license or welfare benefits. It disregards the guarantee afforded by section 17 of article 1 of the Texas Constitution, that the taking of a person's property without consent for the public use is not complete until the compensation due that person is "first made or secured by a deposit of money". Article 3268 of the Texas Civil Statutes implements this Constitutional requirement. It provides that the amount awarded to the property owner by the Special Commissioners at the initial hearing stage of an eminent domain proceeding must be made available to him before the condemning authority is permitted to take possession of his property. In this case, the Petitioner was afforded a hearing before a commission of three disinterested persons who established the amount of the constitutionally required monetary deposit he subsequently accepted.

It is obvious in this case that the Petitioner and the Respondent Power Company were unable to agree on what sum of money contituted "just compensation". The Petitioner has never denied that he had actual notice of the proposed "taking" prior to the filing of the Petition

for Condemnation by the Respondent Texas Power & Light Company. Thus, even prior to the filing of the eminent domain proceeding, the Petitioner knew of the proposed acquisition and could have engaged the judicial machinery of the State to test the authority being relied upon by the Respondent Power Company to invoke the power of eminent domain by seeking injunctive relief. If such litigation had been brought, the burden would have been on the Respondent Texas Power & Light Company to present evidence supporting its right to take the Petitioner's property. *Lone Star Gas Co. v. City of Fort Worth*, 128 Tex. 392, 98 S.W.2d 799 (1936); *Brazos River Conservation and R. Dist. v. Costello*, 135 Tex. 307, 143 S.W.2d 577 (1940); and *Tonahill v. Gulf States Utilities Company*, 446 S.W.2d 301 (Tex. 1969). The Petitioner's argument concerning the need for a hearing at a meaningful time in order to adjudicate the right to take is, therefore, without substance or merit.

Gibson v. Berryhill, 411 U.S. 564 (1973) does not support his corollary contention that due process requires that the issue of whether the Respondent Texas Power & Light Company properly exercised its power of eminent domain be reviewed by a disinterested person or body. If the Petitioner had raised such an issue at the proper time, it would have been adjudicated by the State Court, not by the Respondent Power Company or by a board composed of representatives of the electric utility industry.

CONCLUSION

The fundamental principles of the doctrine of eminent domain have long been firmly established and have been consistently followed in a host of decisions by this Court. A constitutional attack on the particulars of the Texas scheme of eminent domain was recently

before this Court and was rejected. *Joiner v. City of Dallas, supra.* Thus, no novel questions of law are raised in this cause. No conflict of decisions exists with regard to those issues presented by Petitioner. The correctness of the decision below is clear. There being no reason to warrant review of this case by this Court, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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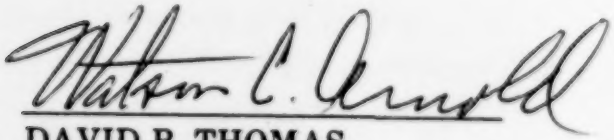

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JOHN L. HILL

CERTIFICATE OF SERVICE

I, Dudley Fowler, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of June, 1976, I have served three (3) copies of the foregoing Reply of Respondents Dolph Briscoe, Governor of Texas, and John L. Hill, Attorney General of Texas, to the Petition for Writ of Certiorari of Dr. Don M. Smart by United States Mail, postage paid, on the following counsel at the addresses shown:

S. L. Lewis, Attorney at Law,
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Counsel for Petitioner
Dr. Don M. Smart;

Don M. Smart, 10611 Garland Road,
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for Petitioner; and

Frank M. Ryburn, Jr., Attorney at Law,
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Counsel for Respondent Texas Power
& Light Company.

Dudley Fowler

DUDLEY FOWLER
Assistant Attorney General